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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 ANTHONY COLEMAN,

8 Plaintiff,

9 v.

10 THE BANK OF NEW YORK MELLON  
11 FKA BANK OF NEW YORK AS TRUSTEE  
12 FOR AMERICAN HOME MORTGAGE  
13 INVESTMENT TRUST 2004-4  
14 MORTGAGE-BACKED NOTES, SERIES  
2004-4, *et al.*,

Defendants.

Case No. 2:16-cv-01339-RFB-GWF

ORDER

Defendants' Motion for  
Summary Judgment [ECF No. 40]

Plaintiff's Motion for Judgment  
on the Pleadings [ECF No. 47]

15 **I. INTRODUCTION**

16 Before the Court is a Motion for Summary Judgment filed by Defendants the Bank of New  
17 York Mellon FKA Bank of New York as Trustee for American Home Mortgage Investment Trust  
18 2004-4 Mortgage Backed Notes, Series 2004-4 ("BNYM"), Mortgage Electronic Registration  
19 Systems, Inc. ("MERS"), and Ocwen Loan Servicing, LLC ("Ocwen") (collectively,  
20 "Defendants"). ECF No. 40. Also before the Court is Plaintiff Anthony Coleman's ("Plaintiff")  
21 Motion for Judgment on the Pleadings. ECF No. 47.  
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23 **II. PROCEDURAL BACKGROUND**

24 Plaintiff has alleged various causes of action including: (a) declaratory relief regarding  
25 promissory note and deed of trust; (b) fraud and deceit; (c) promissory estoppel; (d) violation of  
26 New York's Deceptive Trade Practices Act; (e) violation of Nevada's business and professional  
27 code; (f) violation of the Fair Debt Collection Practices Act; and (g) statutorily defective closure.  
28 For all of these claims, Plaintiff essentially requests that the Court declare the Deed of Trust to be

1 void and declare that the Defendants had and have no authority to foreclose on the real property at  
2 issue in this litigation. Plaintiff further requests that the Court enjoin Defendants from pursuing  
3 further foreclosure proceedings against the property at issue.

4 Plaintiff sued Defendants on June 15, 2016. Plaintiff also filed a Notice of *Lis Pendens* on  
5 June 15, 2016. Plaintiff filed a First Amended Complaint on August 22, 2017. Defendants filed  
6 the pending Motion for Summary Judgment on October 10, 2017. Defendants incorporate three  
7 Requests for Judicial Notice, which were filed at ECF No. 9, 15, and 45. Plaintiff filed a motion  
8 for Judgment on the Pleadings on August 24, 2018. The Court held a hearing on the Motion for  
9 Summary Judgment on August 28, 2018.

### 10 11 **III. FACTUAL BACKGROUND**

12 The Court finds the following facts to be undisputed. This matter involves a property  
13 located at 6136 Benchmark Way, North Las Vegas, Nevada, 89031 (the “Property”).<sup>1</sup> In October  
14 2004, Plaintiff executed a promissory note in the principal amount of \$311,250.00 (the “Note”).  
15 The Note was payable to non-party American Home Mortgage Acceptance, Inc. (“AHMAI”). The  
16 Note was secured by a first Deed of Trust, which was recorded against the Property on October  
17 26, 2004. The Deed of Trust designated MERS—acting solely as nominee for AHMAI and its  
18 successors and assigns—as the beneficiary and Fidelity National Title (“Fidelity”) as the trustee.  
19 Plaintiff later defaulted on the Note.

20 AHMSI Default Services, Inc. (“AHMSI Default”) was substituted into the Deed of Trust  
21 as the new trustee on September 2, 2008, evidenced by the Substitution of Trustee recorded on  
22 September 24, 2008. After Plaintiff defaulted on the Note, AHMSI Default caused a Notice of  
23 Default and Election to Sell (the “2008 Notice of Default”) to be recorded on September 2, 2008.

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24 <sup>1</sup> Federal Rule of Evidence 201(b) allows courts to judicially notice adjudicative facts that  
25 cannot be reasonably disputed, meaning facts that “can be accurately and readily determined from  
26 sources whose accuracy cannot reasonably be questioned.” These facts include “documents on  
27 file in federal or state courts,” Harris v. Cnty. of Orange, 682 F.3d 1126, 1132 (9th Cir. 2012), as  
28 well as documents of public record, Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).  
The Court takes judicial notice of the documents filed in other courts and the documents on public  
record in this matter, which are referenced in the Factual Background section herein and filed at  
ECF Nos. 9, 15, and 45.

1 MERS then assigned the beneficial interests under the Deed of Trust to American Home Mortgage  
2 Servicing, Inc. (“AHMSI”) on September 25, 2008. On December 4, 2008, AHMSI Default caused  
3 a Notice of Trustee Sale (“2008 Notice of Sale”) to be recorded.

4 The Property was, however, not sold pursuant to the 2008 Notice of Default and 2008  
5 Notice of Sale because Plaintiff filed for bankruptcy on December 22, 2008. Plaintiff specifically  
6 filed a voluntary petition under Chapter 7 of the Bankruptcy Code, thereby initiating Case No. 08-  
7 25333 in the United States Bankruptcy Court, District of Nevada (the “Bankruptcy Action”). In  
8 the Bankruptcy Action, Plaintiff listed the Property as an asset of his estate, noting that his current  
9 interest in the Property was valued at \$0 and that there was a secured claim of \$396,603.47  
10 belonging to AHMSI. He further indicated that there were no “[o]ther contingent and unliquidated  
11 claims of every nature, including . . . counterclaims of the debtor[.]” On January 1, 2009,  
12 Homeward Residential, Inc. (“Homeward”), as the loan servicer at the time, filed a Motion for  
13 Relief from the Stay in the Bankruptcy Action to permit foreclosure to proceed. Plaintiff did not  
14 file any opposition. On February 13, 2009, the Bankruptcy Court entered an Order Terminating  
15 the Automatic Stay, allowing the foreclosure to proceed.

16 Plaintiff and Homeward attempted to engage in discussions regarding foreclosure  
17 alternatives from about February 2009 to March 2011. During this time, an Assignment of the  
18 Deed of Trust from AHMSI to the BNYM was recorded against the Property on December 4,  
19 2009.

20 When the discussions regarding foreclosure alternatives failed, AHMSI Default (now  
21 known as Power Default Services, Inc.) caused a second Notice of Trustee’s Sale (“2011 Notice  
22 of Sale”) to be recorded on March 28, 2011. BNYM purchased the Property at a public auction  
23 on April 20, 2011. On August 18, 2014, AHMSI Default caused a Notice of Rescission of Notice  
24 of Default and Election to Sell Under Deed of Trust to be recorded against the Property, rescinding  
25 the 2008 Notice of Default.

26 On February 3, 2016, a Substitution of Trustee was recorded against the Property in which  
27 Western Progressive-Nevada, Inc. was named as the substitute trustee under the Deed of Trust by  
28 BNYM. On March 11, 2016, a Notice of Default and Election to Sell Real Property was recorded

1 against the Property by Western Progressive-Nevada, Inc. as trustee for the beneficiary. On June  
2 2, 2016, a Certificate from the State of Nevada Foreclosure Mediation Program was recorded  
3 against the Property, stating: “The Beneficiary may proceed with the foreclosure process.” On  
4 July 18, 2016, a Notice of Trustee’s Sale (“2016 Notice of Sale”) was recorded against the  
5 Property. No foreclosure sale of the Property has taken place since the recording of the 2016  
6 Notice of Sale.

#### 7 8 **IV. LEGAL STANDARD**

9 Summary judgment is appropriate when the pleadings, depositions, answers to  
10 interrogatories, and admissions on file, together with the affidavits, if any, show “that there is no  
11 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”  
12 Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering  
13 the propriety of summary judgment, the court views all facts and draws all inferences in the light  
14 most favorable to the non-moving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir.  
15 2014). If the movant has carried its burden, the non-moving party “must do more than simply  
16 show that there is some metaphysical doubt as to the material facts . . . . Where the record taken  
17 as a whole could not lead a rational trier of fact to find for the non-moving party, there is no  
18 genuine issue for trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal  
19 quotation marks omitted). It is improper for the Court to resolve genuine factual disputes or make  
20 credibility determinations at the summary judgment stage. Zetwick v. Cty. of Yolo, 850 F.3d 436,  
21 441 (9th Cir. 2017) (citations omitted).

#### 22 23 **V. DISCUSSION**

24 Plaintiff brought this suit seeking an order declaring Defendants had no authority to  
25 foreclose on the Property. Defendants move for summary judgment, which the Court grants on  
26 two bases: judicial estoppel and lack of standing. The Court addresses each bases in turn below.

##### 27 **A. Judicial Estoppel**

28 The Court first considers the doctrine of judicial estoppel. “Judicial estoppel is an equitable

1 doctrine that precludes a party from gaining an advantage by asserting one position, and then later  
2 seeking an advantage by taking a clearly inconsistent position.” Hamilton v. State Farm Fire &  
3 Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001). Courts “invoke[] judicial estoppel not only to prevent  
4 a party from gaining an advantage by taking inconsistent positions, but also because of general  
5 consideration[s] of the orderly administration of justice and regard for the dignity of judicial  
6 proceedings, and to protect against a litigant playing fast and loose with the courts.” Id. (internal  
7 quotation marks omitted). There are three factors courts consider in determining whether to apply  
8 judicial estoppel: (1) the party's later position must be “clearly inconsistent” with its earlier  
9 position; (2) the party has succeeded in persuading a court to accept that party's earlier position so  
10 that judicial acceptance of an inconsistent position in a later proceeding would create “the  
11 perception that either the first or the second court was misled[;]” and (3) the party seeking to assert  
12 an inconsistent position would derive an unfair advantage or impose an unfair detriment on the  
13 opposing party if not estopped. Id. at 782–83 (quoting New Hampshire v. Maine, 532 U.S. 742  
14 (2001)).

15 “This court has restricted the application of judicial estoppel to cases where the court relied  
16 on, or accepted, the party's previous inconsistent position.” Id. at 783. The application of judicial  
17 estoppel is not limited to bar the assertion of inconsistent positions in the same litigation, but is  
18 also appropriate to bar litigants from making incompatible statements in two different cases. Id.  
19 “In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised  
20 in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure  
21 statements. Hay v. First Interstate Bank of Kalispell, N.A., 978 F.2d 555, 557 (9th Cir.1992)  
22 (failure to give notice of a potential cause of action in bankruptcy schedules and disclosure  
23 statements estops the debtor from prosecuting that cause of action).

24 The Court finds that Plaintiff is judicially estopped from asserting a dispute as to BNYM’s  
25 interest in the Property and from asserting his own alleged interest in the Property due to Plaintiff’s  
26 failure to assert the dispute or his interest in his Bankruptcy Action. Plaintiff’s position of asserting  
27 a claim regarding the interest of the Property is clearly inconsistent with his earlier claim that he  
28 had no interest in the Property and with his failure to assert the claims in this lawsuit in his

1 Bankruptcy Action. Based upon these assertions and his non-opposition to the bankruptcy motion  
2 to remove the Property from the estate for the purpose of foreclosure, the Bankruptcy Court  
3 removed the Property from the estate and allowed the foreclosure to proceed. If Plaintiff were  
4 allowed to proceed on his theories in this matter, Plaintiff would potentially be allowed to retain  
5 the Property even though he had disclaimed an interest in the Property in the Bankruptcy Action  
6 and failed to assert any claims against the Defendants in these proceedings. This would afford  
7 Plaintiff an unfair advantage. Thus, the elements of judicial estoppel have been met. The Court  
8 grants Defendants' Motion for Summary Judgment accordingly as to all of Plaintiff's claims.

### 9 **B. Standing**

10 The Court also grants Defendants' Motion for Summary Judgment based on Plaintiff's lack  
11 of standing to challenge the legality of the assignments of the Deed of Trust. Plaintiff challenges  
12 the legality of the assignments of the Deed of Trust, arguing that the assignments occurred after  
13 the closing date of the trust related to this matter. His argument relies on the pooling and servicing  
14 agreement between certain Defendants and also non-parties, an agreement to which Plaintiff was  
15 not a party. When a plaintiff homeowner "is neither a party to nor an intended beneficiary of [a  
16 pooling and servicing agreement], the homeowner lacks standing to contest the assignment's  
17 validity." Wood v. Germann, 331 P.3d 859, 862 (Nev. 2014). Here, Plaintiff is neither a party nor  
18 an alleged intended beneficiary under the pooling and servicing agreement entered into between  
19 certain Defendants and also non-parties. Thus, Plaintiff lacks standing to challenge the  
20 assignments of the Deed of Trust. As Plaintiff's claims all arise from his assertion that the  
21 assignments regarding the Deed of Trust are void, the Court grants summary judgment on all of  
22 Plaintiff's claims in favor of Defendants accordingly.

## 23 24 **VI. CONCLUSION**

25 **IT IS ORDERED** that Defendants' Motion for Summary Judgment (ECF No. 40) is  
26 GRANTED.

27 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Judgment on the Pleadings (ECF  
28 No. 47) is DENIED as moot.

